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| JACOBSON, MICHELE LYNN | | | | |
| ART UNIT | | PAPER NUMBER | | |
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/588,477

Applicant(s)

FOEGLER ET AL.

Examiner

MICHELE JACOBSON

Art Unit

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 08 December 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-21 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-21 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SE-08)
Paper No(s)/Mail Date 8/1/06, 12/8/08
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Information Disclosure Statement

1. The examiner apologizes for the oversight of the information disclosure statement filed 8/1/06 in the previous office action. This information disclosure statement has been considered and an annotated copy has been included with the instant office action.

Claim Rejections - 35 USC § 112

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claim 21 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 21 recites "A food casing formed from a support layer consisting of a textile layer, said textile layer comprising an edible coating". "The transitional term "comprising", which is synonymous with "including," "containing," or "characterized by," is inclusive or open-ended and does not exclude additional, unrecited elements or method steps. See, e.g., > *Mars Inc. v. H.J. Heinz Co.*, 377 F.3d 1369, 1376, 71 USPQ2d 1837, 1843 (Fed. Cir. 2004)" (MPEP 2111.03) "The transitional phrase "consisting of" excludes any element, step, or ingredient not specified in the claim. *In re Gray*, 53 F.2d 520, 11 USPQ 255 (CCPA 1931); *Ex parte Davis*, 80 USPQ 448, 450 (Bd. App. 1948)" (MPEP 2111.03) In the instant case,

recitation that the support layer consists of a textile layer comprising an edible coating is contradictory since the word "comprising" implies that that components of the textile layer are open ended. Therefore, the support layer is not required to *consist* of a textile layer. Since it is unclear what was meant by the claim, for the purpose of examination the claim will be interpreted to encompass the broader open ended interpretation indicated by the recitation of "comprising". Appropriate clarification is required.

Claim Rejections - 35 USC § 102

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

5. Claims 1-4, 6, 7, 10-12, 13, 15-17, 19, 20 and 21 are rejected under 35 U.S.C. 102(b) as being anticipated by Ito et al. European Patent Application Publication No. 408164 ((hereafter referred to as Ito).

6. Ito teaches a water-resistant matrix web with a food flavoring material disposed on it comprising food flavoring material dispersed on a binder material. (Pg. 2, lines 27-30) The water resistant matrix web is recited to be comprised of natural or artificial fiber materials such as polymers of cellulose and other natural materials (viscose, acetate, etc), polyester, polyamide, polyethylene, polypropylene and viscose coated Manilla paper. (Pg. 2, lines 37-44, 56) Webs produced from such natural or artificial fibers are interpreted by the examiner to read on the textile and consolidated nonwoven support

layers recited in claims 1 and 21 since the web is made out of fibers which is the definition of a textile and is nonwoven as recited.

7. The food layer is recited to include herbs, pepper, cheese powder and powders of vegetable extracts. (Pg. 3, lines 8-17) The binder layer for the flavoring material is recited to be comprised of polysaccharides such as starch, modified starch, carboxymethylcellulose and protein such as gelatin. (Pg. 3, lines 22-28) The selection of these materials is recited to result in the food layer being neatly transferred onto the surface of the food disposed in a casing made of such a laminate.

8. The laminate is produced by applying a solution of the binder layer material to the matrix web followed by applying the food layer material in a powdery, granular or chip form onto the coated web and drying the thus formed sheet material. The formed sheet may then be formed into a tube for use as a sausage casing by heat sealing the film or by joining the edges of a non-heat-sealable film with the aid of an adhesive tape. (Pg. 3, lines 33-42) When the sheet is brought into contact with a web substrate food, the food material is transferred from the matrix to the substrate food, thus effectively flavoring or spicing the food. (Pg. 4, lines 7-9)

9. Ito anticipates the adhesively longitudinally seamed sausage casing comprising an edible, essentially water-insoluble, flavor transferring layer comprising gelatin or starch and a flavoring such as herbs, pepper or vegetable flavoring supported on a fibrous matrix comprising natural or synthetic fibers such as cellulose, polyester, polyamide and polyolefin recited in claims 1-4, 6, 7, 10, 11, 15-17 and 19 produced by the method recited in claims 12, 13 and 20.

10. Regarding claim 13 the examiner notes the recitation of the plasticizer is optional and therefore although Ito fails to recite the disposition of plasticizer in the flavor transfer layer disclosed, Ito still anticipates the non-optional limitations of claim 13.

11. Claims 1-3, 5-10, 15, 16 and 18 are rejected under 35 U.S.C. 102(b) as being anticipated by Niaura et al. U.S. Patent No. 5,085,890 (hereafter referred to as Niaura).

12. Niaura teaches a fibrous cellulose sausage casing substrate (made from cotton or wood pulp) having indicia printed in water soluble material such as caramel protected by a water insoluble binder-sealant layer. (Col. 6, lines 24-27, 48-51, Col. 15, lines 58-61, Col. 9, lines 63-65) The binder sealant layer is transferred from the substrate to the surface of the enclosed food thus carrying the indicia with it for labeling of the product upon removal of the exterior substrate casing. (Col. 16, lines 45-49) The binder sealant may be comprised of protein material such as zein. (Col. 17, lines 6-7) Niaura also recites that the casing substrate may further comprise an oxygen barrier layer material. (Col. 18, lines 27-29)

13. The sausage casing comprising a tubular, fibrous, cellulosic substrate comprising an oxygen barrier layer with a layer of water soluble indicia covered by an edible water insoluble binder-sealant layer comprising zein where the edible binder-sealant layer adheres to the proteinaceous food stuff more strongly and to the substrate material recited in claims 1-3, 5-10, 15, 16 and 18 is anticipated Niaura. The examiner interprets the binder-sealant layer recited by Niaura to be equivalent to the edible coating containing dye and/or flavorings as recited in claim 1 since the printed indicia recited by

Niaura comprising caramel can be interpreted to be both a dye and a flavoring and the indicia is contained on the binder-sealant layer recited. Additionally, the indicia recited by Niaura is between the exterior substrate layer and the binder sealant, is water-soluble, and can be interpreted as a dye and a layer therefore meeting the limitation of water-soluble material arranged between the substrate layer and the edible coating layer recited in claim 5.

Claim Rejections - 35 USC § 103

14. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

15. Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ito et al. European Patent Application Publication No. 408164 ((hereafter referred to as Ito).

16. Ito teaches what has been recited above but is silent regarding the disposition of an additional exterior layer on the fibrous substrate layer. Ito also discloses that the inventive casing is alternately desired to be permeable and impermeable to air depending on the product encased. (Pg. 2, lines 48-55)

17. The examiner takes official notice that it is well known in the sausage casing art to use barrier layers. It would have been obvious to one having ordinary skill in the art at the time the invention was made to have used a fibrous cellulosic casing to which a barrier layer had been applied for the substrate to which the inventive coatings

disclosed by Ito would then be applied. This obvious utilization of a barrier layer containing substrate would have produced the method as claimed in claim 14.

Response to Arguments

18. Applicant's arguments filed 12/8/08 have been fully considered but they are not persuasive.

19. Applicant asserts on pages 7 and 8 of the remarks that Ito and Niaura fail to disclose coatings comprising a "mixture" of edible binder and solids or flavorings. Since the flavorings recited by Ito are embedded within the binder material, they are reasonably broadly interpreted by the examiner to be "mixed" therein and therefore comprise a "mixture". The same reasoning applies to Niaura.

20. Applicant asserts on page 7 of the remarks that Ito "fails to teach or suggest such coatings that are essentially water-insoluble". However, applicant has not specifically defined the term "essentially water-insoluble". Ito teaches the same binder materials as recited by applicant and they are therefore interpreted to meet the limitation of being "essentially water-insoluble".

21. Applicant has generically asserted on page 8 of the remarks that Ito "most certainly does not teach or suggest such coatings comprising at least one edible binder which adheres to the textile support material less strongly than to a proteinaceous foodstuff" but has failed to present any reasoning as to why this is the case or any evidence proving that the binders recited by Ito do not meet this limitation. It is noted that "the arguments of counsel cannot take the place of evidence in the record", *In re*

Schulze, 346 F.2d 600, 602, 145 USPQ 716, 718 (CCPA 1965). It is the examiner's position that the arguments provided by the applicant regarding whether the edible binder of Ito binds more strongly to the sausage or the support web must be supported by a declaration or affidavit. As set forth in MPEP 716.02(g), "the reason for requiring evidence in a declaration or affidavit form is to obtain the assurances that any statements or representations made are correct, as provided by 35 U.S.C. 24 and 18 U.S.C. 1001".

22. Applicant asserts on page 8 of the remarks that Niaura "does not teach or suggest the recited textile support layers, much less such textile supports comprising a coating". Applicant's specification specifically recites "textile support material is preferably ... consolidated nonwoven... These are produced, in particular, from natural fibers such as ... cellulose fibers". (Para. 16 of the pre-grant Patent Application Publication) Applicant has failed to present any reasoning or arguments to prove that the fibrous cellulose casing substrate recited by Niaura does not meet the limitation of a consolidated nonwoven. Additionally, applicant never recites that the coating must completely cover the substrate, and therefore any coating recited, even if merely printing, meets the limitation of a coating.

23. Applicant has asserted on page 8 that Niaura does not teach the limitations of claim 21, however, Niaura has not been cited by the examiner to anticipate the limitations of claim 21. This argument is therefore not germane.

Conclusion

1. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to **MICHELE JACOBSON** whose telephone number is **(571)272-8905**. The examiner can normally be reached on **Monday-Thursday 8:30 AM-7 PM EST**.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, **David Sample** can be reached on **(571)272-1376**. The fax phone number for the organization where this application or proceeding is assigned is **571-273-8300**.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/David R. Sample/
Supervisory Patent Examiner, Art Unit 1794

Michele L. Jacobson
Examiner /M. J./
Art Unit 1794